(19)

No. 05-5234

IN THE
SUPREME COURT OF THE UNITED STATES

ADRIAN MARTELL DAVIS,

Petitioner

v.

STATE OF WASHINGTON,

Respondent.

On Petition for Writ of Certiorari to the
Washington Supreme Court

PETITION FOR A WRIT OF CERTIORARI

NANCY COLLINS
WASHINGTON APPELLATE PROJECT
1511 Third Avenue
Suite 701
Seattle, WA 98101
(206) 587-2711

JEFFREY L. FISHER
Counsel of Record
LISSA WOLFENDALE SHOOK
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

QUESTION PRESENTED

Whether an alleged victim's statements to a 911 operator naming her assailant – admitted as "excited utterances" under a jurisdiction's hearsay law – constitute "testimonial" statements subject to the Confrontation Clause restrictions enunciated in *Crawford v. Washington*, 541 U.S. 36 (2004).

TABLE OF CONTENTS

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 7

A. Courts Are Deeply Divided Over Whether Alleged Victims' Statements To Governmental Agents Describing Recent Criminal Activity – Admitted As Excited Utterances Under A Jurisdiction's Hearsay Law – Constitute "Testimonial" Statements. 8

B. The Decision Below Interprets *Crawford*'s Testimonial Principle Too Narrowly. 18

C. There Is A Pressing Need For This Court To Delineate The Scope Of *Crawford*'s Testimonial Principle, Especially In This Context 30

D. This Case Is An Excellent Vehicle For Clarifying The Scope Of The Testimonial Principle. 38

CONCLUSION 40

APPENDIX A, Opinion of the Washington Supreme Court A1

APPENDIX B, Opinion of the Washington Court of Appeals A12

APPENDIX C, Valley Communications Center, Standard Operating Procedures, Policy 602 ..... A21

APPENDIX D, Transcript of 911 Call A24

TABLE OF AUTHORITIES

CASES

Anderson v. State, 111 P.3d 350 (Alaska App. 2005).....12

Berkemer v. McCarty, 468 U.S. 420 (1984).....23

Bruton v. United States, 391 U.S. 123 (1968).....28

California v. Green, 399 U.S. 149 (1970).....28

City of Akron v. Hutton, 2005 WL 1523880 (Ohio App. June 29, 2005).....10

Commonwealth v. Gray, 867 A.2d 560 (Pa. App. 2005).....13

Siler v. Ohio, 125 S. Ct. 671 (2004).....10

Crawford v. Washington, 541 U.S. 36 (2004).....passim

Davis v. State, 2005 WL 183141 (Tex. App. Jan. 27, 2005).....12

Davis v. State, ___ S.W.3d ___, 2005 WL 1173964 (Tex. App. May 19, 2005).....17

Drayton v. United States, ___ A.2d ___, 2005 WL 1413862 (D.C. June 16, 2005).....12

Florida v. Bostick, 501 U.S. 429 (1991).....23

Hammon v. State, ___ N.E.2d ___, 2005 WL 1406007 (Ind. June 16, 2005).....12, 32, 35

Heard v. Commonwealth, 2004 WL 1367163 (Ky. App. June 18, 2004) *review granted* (Ky. 2004).....16

Howard v. State, ___ So. 2d ___, 2005 WL 1248965 (Fla. App. May 27, 2005).....15

Key v. State, ___ S.W.3d ___, 2005 WL 467167 (Tex. App. Feb. 28, 2005), *review denied* (Tex. June 29, 2005).....12

Leavitt v. Arave, 383 F.3d 809 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2540 (2005).....11

Lilly v. Virginia, 527 U.S. 116 (1999).....27

Lopez v. State, 888 So. 2d 693 (Fla. App. 2004).....15, 18, 40

Manuel v. State, ___ So. 2d ___, 2005 WL 1130183 (Fla. App. May 16, 2005).....15

Marc v. State, ___ S.W.3d ___, 2005 WL 1294969 (Tex. App. June 2, 2005).....12, 29, 35

Mason v. State, ___ S.W.3d ___, 2005 WL 1531286 (Tex. App. June 30, 2005).....15

Massey v. Lamarque, 2005 WL 1140025 (9th Cir. May 9, 2005).....12

Miller v. State, ___ S.E.2d ___, 2005 WL 1423393 (Ga. App. June 20, 2005) 15

Moody v. State, 594 S.E.2d 350 (Ga. 2004).....15

Mungo v. Duncan, 393 F.3d 327 (2d Cir. 2004).....12, 39

Ohio v. Roberts, 448 U.S. 56 (1980).....5, 8

Packer v. State, ___ So. 2d ___, 2005 WL 1252752 (Ala. Crim. App. May 27, 2005).....13

People v. Adams, 16 Cal. Rptr. 3d 237, 244 (Cal. App), *review granted* (Cal. 2004).....16

People v. Bechtol, 2004 WL 2726076 (Mich. App. Nov. 30, 2004) 13

People v. Brown, 517 N.E.2d 515 (N.Y. 1987) 22

People v. Bryant, 2004 WL 1882661 (Mich. App. Aug. 24, 2004).....13

People v. Cage, 15 Cal. Rptr. 3d 846, 856-57 (Cal. App.), *review granted* (Cal. 2004) 13, 39

People v. Caudillo, 19 Cal. Rptr. 3d 574 (Cal. App. 2004).....13

People v. Corella, 18 Cal. Rptr. 3d 770 (Cal. App. 2004).....6, 13, 19, 26, 27, 40

People v. Cortes, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004).....16, 17, 28, 40

People v. Diaz, ___A.D. ___, 2005 WL 1514448 (N.Y. App. June 28, 2005) 12, 29

People v. Dobbin, 791 N.Y.S.2d 897 (N.Y. Sup. Ct. 2004) 16

People v. Jimenez, 2004 WL 1832719 (Cal. App. Aug. 17, 2004).....29, 32

People v. Kilday, 20 Cal. Rptr. 3d 161 (Cal. 2004), *review granted* (Cal. 2005).....13, 40

People v. King, ___ P.3d ___, 2005 WL 170727 (Colo. App. Jan. 27, 2005).....10, 11, 40

People v. Lugo, 2004 WL 2092018 (Cal. App. 2004) 40

People v. Moscat, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004) 16, 31, 32

People v. Victors, 819 N.E.2d 311 (Ill. App. 2004), *appeal denied*, ___ N.E.2d ___ (Ill. Mar. 30, 2005) 16

People v. Walker, 697 N.W.2d 159 (Mich. App.) (2-1 decision) 12, 24

People v. West, 823 N.E.2d 72 (Ill. App. 2005) 16

Rhode Island v. Innis, 446 U.S. 291 (1980) 23

Senior v. State, ___ S.E.2d ___, 2005 WL 1208102 (Ga. App. May 23, 2005) 15

Spencer v. State, 162 S.W.3d 877 (Tex. App. 2005) 12, 21, 28

Stancil v. United States, 866 A.2d 799 (D.C. 2005) 12, 22, 26, 31, 40

State v. Alvarez, 107 P.3d 350 (Ariz. App. 2005) 13

State v. Anderson, 2005 WL 171441 (Tenn. App. Jan. 27, 2005) 10, 11

State v. Barnes, 854 A.2d 208 (Me. 2004) 12, 29

State v. Branch, 865 A.2d 673 (N.J. 2005) 17

State v. Cannaday, 2005 WL 736583 (Ohio App. March 31, 2005) 10

State v. Clark, 598 S.E.2d 213 (N.C. App.), *review denied*, 601 S.E.2d 866 (N.C. 2004) 161

State v. Dixon, 684 P.2d 725 (Wash. App. 1984) 21

State v. Forrest, 596 S.E.2d 22 (N.C. App. 2004) (2-1 decision), *aff'd*, 611 S.E.2d 833 (N.C. 2005) (per curiam) 13

State v. Grace, 111 P.3d 28 (Haw. App.), *cert. denied* (Haw. 2005) 15, 32

State v. Greene, 874 A.2d 750 (Conn. 2005) 12, 30, 39

State v. Hembertt, 696 N.E.2d 473 (Neb. 2005) 12, 14 35

State v. Hill, 827 N.E.2d 351 (Ohio App. 2005) 15

State v. Lee, 2005 WL 1540575 (Ohio App. July 1, 2005) 15

State v. Lewis, 603 S.E.2d 559 (N.C. App.), *review allowed and appeal dismissed*, 605 S.E.2d 638 (N.C. 2004) 16

State v. Morrison, 1999 WL 429806 (Wash. App. 1999) 21

State v. Rapp, 2005 WL 1397205 (Iowa App. June 15, 2005) 16

State v. Ruth, ___ S.W.3d ___, 2005 WL 1431324 (Tex. App. June 21, 2005) 12, 31

State v. Siler, 2003 WL 22429053 (Ohio App. 2003) 10

State v. Thomas, 83 P.3d 970 (Wash. 2004) 21

State v. Williams, 2005 WL 120054 (Ohio App. 2005) 31

State v. Williamson, 996 P.2d 1097 (Wash. App. 2000) 21

State v. Wright, 686 N.W.2d 295 (Minn. App.), *review granted* (Minn. 2004) 10

State v. Wright, 2005 WL 147487 (Minn. App.), *review denied* (Minn. 2005) 11

In re T.T., 815 N.E.2d 789 (Ill. App. 2004) 16

United States v. Andrews, 2005 WL 1395049 (11th Cir. June 14, 2005) 16

United States v. Arnold, ___ F.3d ___, 2005 WL 1431484 (6th Cir. June 21, 2005) 15, 17, 26

United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005) 24

United States v. Cromer, 389 F.3d 662 (6th Cir. 2004) 20, 23, 39

United States v. Luciano, ___ F.3d ___ (1st Cir. July 8, 2005) 10

White v. Illinois, 502 U.S. 346 (1992) 7, 9, 18, 37

Wilson v. State, 151 S.W.3d 694 (Tex. App. 2004) 12

STATUTES

28 U.S.C. § 1257(a) 1

Fed. R. Evid. 803(2) 37

Wash. R. Evid. 803(a)(2) 37

Wash. Rev. Code § 26.50.110(1) & (4) 4

OTHER AUTHORITY

Best, Major Robert Wm., *To Be Or Not To Be Testimonial?*, 2005 Army Lawyer 65 (2005) 30, 32, 36, 39

Bloom, Donna B, Comment, *"Utter Excitement" About Nothing: Why Domestic Violence Evidence-Based Prosecutions Will Survive* Crawford v. Washington, 36 St. Mary's L.J. 717, 731 (2005) 31

Byrom, Celeste E., Note, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases After* Crawford v. Washington, 24 Rev. Litig. 409 (2005) 33, 37

Claypoole, Erin Leigh, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases Without a Victim*, 39 Prosecutor 18 (Feb. 2005) 8, 33, 34

Cohen, Neil P. & Paine, Donald F., Crawford v. Washington: *Confrontation Revolution*, 40 Tenn. Bar J. 22 (May 2004) 36

Council, John, *The* Crawford *Questions*, Law.com, July 2, 2004 <http://www.law.com/jsp/ article.jsp?id=1088138437273> 36

Davis, Wendy N. *Hearsay, Gone Tomorrow?*, 90 ABA Journal 22 (Sept. 2004) 34

Dyer, Cindy, *Sample* Crawford *Predicate Questions*, 1 The Voice 8 (Nov. 2004) <http://www.ndaa-apri.org/pdf/ the_voice_vol_1_issue_1.pdf> 34

Feige, David, *Domestic Silence: The Supreme Court Kills Evidence-Based Prosecution*, Slate, Mar. 12, 2004 <http://slate.msn.com/id/2097041> 35

Friedman, Richard D. & McCormack, Bridget *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171 (2002) 21, 25, 31

Friedman, Richard D., *Grappling with the Meaning of "Testimonial,"* <http:// www.personal.umich.edu/rdfrdman/Grappling1.pdf> (2005) 26

Imwinkelried, Edward J., *The Treatment of Prosecution Hearsay Under* Crawford v. Washington: *Some Good News But . . .*, 28 The Champion 16 (Sept./Oct. 2004) 36

Karan, Amy & Gersten, David M., *Domestic Violence Hearsay Exceptions in the Wake of* Crawford v. Washington, 13 Juvenile & Family Justice Today No. 2, at 20 (Summer 2004) 11, 32

King-Ries, Andrew, Crawford v. Washington: *The End of Victimless Prosecution?*, 28 Seattle U. L. Rev. 301 (2005) 31, 33

Lininger, Tom, *Prosecuting Batterers After* Crawford, 91 Va. L. Rev. 747 (2005) 15, 27, 36

Krischer, Adam M., *"Though Justice May Be Blind, It Is Not Stupid": Applying Common Sense to* Crawford *In Domestic Violence Cases*, 38 Prosecutor 14 (Nov./Dec. 2004) <www.ndaa-apri.org/publications/ndaa/toc_prosecutor.html> 33

Mosteller, Robert P., Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511 (2005) 20, 21, 32, 35

Murphy, Wendy, *New Strategies for Effective Child Abuse Prosecutions After* Crawford, 23 ABA Child Law Practice 129 (Oct. 2004) 8, 29, 30, 34

Opatmy, Dennis J., Crawford *Ruling Affirms Confrontation Clause*, L.A. Daily J., Apr. 14, 2004, at 1 36

Phillips, Allie, *Weathering the Storm After* Crawford v. Washington, 17 Update No. 6 (American Prosecutors Research Institute Nov. 6, 2004) 36

Post, Leonard, *Prosecutors Feel Broad Wake of* 'Crawford', 27 Nat'l L.J. No. 15, Dec. 13, 2004, at 1 36

Siegal, Andrew, *Court Is Adjourned - What Have We Learned?*, 16 S. Carolina Lawyer 14 (2004) 36

Sin, Won, Comment, Crawford v. Washington: *Confrontation Clause Forbids Admission of Testimonial Out-of-Court Statements Without Prior Opportunity to Cross-Examine*, 40 Harv. C.R.-C.L. L. Rev. 223 (2005) 32

The Supreme Court - Leading Cases, 118 Harv. L. Rev. 248 (2004) 32

Valladares, Rene L. & Forsman, Franny A. Crawford v. Washington: *The Confrontation Clause Gets Teeth*, 12 Nev. Law. 12 (Sept. 2004) 30, 35

Veith, Victor I., *Keeping the Balance True: Admitting Child Hearsay in the Wake of* Crawford v. Washington, 16 Update No. 12 (American Prosecutors Research Institute 2004) <http://www.ndaa-apri.org/publications/newsletters/update_volume_16_number_12_2004.html> 33

Wigmore, John Henry, Evidence (J. Chadbourn ed. 1976) 22

NBA 166728v1 50062-81155

PETITION FOR A WRIT OF CERTIORARI

Adrian Martell Davis respectfully petitions for a writ of certiorari to the Washington Supreme Court in *State v. Davis*, No. 73893-9.

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at ___ Wn.2d ___, 111 P.3d 844 (Wash. 2005), and is attached at App. 1-11. The opinion of the Washington Court of Appeals is published at 116 Wn. App. 81, 64 P.3d 661 (Wash. App. 2003), and is attached at App. 12-20. The relevant order of the trial court is unpublished.

STATEMENT OF JURISDICTION

The Washington Supreme Court issued its opinion on May 12, 2005. App. 1. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

This case presents this Court with an opportunity to clarify the bounds of the recent landmark decision in *Crawford v. Washington*, 541 U.S. 36 (2004), with respect to the question that is troubling the lower courts more deeply than any other: Whether an alleged victim's report to a governmental agent describing criminal activity that allegedly occurred moments ago – admissible as an excited utterance under a jurisdiction's hearsay law – constitutes a "testimonial" statement, and thus may not be introduced against the accused absent a showing of the victim's unavailability and a prior opportunity for cross-examination.

1. The City of Kent, Washington, like other political subdivisions in the United States, maintains a 911 telephone system. Dialing 911 connects a caller with an operator "associated with the police," App. 5, and allows the caller to request emergency assistance or to register less urgent complaints. The City's website advises its citizens: "If you need to see a police officer, want to report a crime, or observe suspicious activity, call 9-1-1. Even if it is not an 'emergency.'" <http://www.ci.kent.wa.us/emergency/911.asp>.

911 operators in Kent, as elsewhere, are trained to gather information from callers and to coordinate quick responses. In order to maintain "a uniform method of interviewing callers requesting police assistance," Policy 602 of the Standard Operating Procedures for Kent's 911 system supplies detailed guidelines "to be used during the interview of a reporting party" during a "police incident interview." App. 21-23 (attaching Policy); *see also* App. 9 n.5 (Sanders, J., dissenting) (discussing this Policy). It instructs: "On all police related calls, the call taker shall obtain pertinent information, such as where the incident occurred, what type of incident occurred, when the incident occurred, if weapons were involved, who was involved, why it occurred and the reporting party's information." App. 21. The Policy then outlines several suggested questions for obtaining this information. App. 21-23. Because "[a]n officer may arrest a subject on information given to him by a [911 operator]," the Standard Operating Procedures direct operators to "[q]uestion aggressively" and to "[b]e tenacious in obtaining information from reporting parties." Standard Operating Procedures, Section 4, at 29.

2. Just before noon on February 1, 2001, Michelle McCottry, a resident of Kent, Washington, called 911. A 911 operator answered, but McCottry hung up before saying

anything. The operator called McCottry right back and asked her what was happening. McCottry, who sounded "hysterical and crying," said that a man who "had left the residence moments earlier" had beat her with his fists. App. 3. After the operator told McCottry she had "help started" (presumably meaning that police were on the way) the operator urged McCottry to "[l]isten to me carefully," App. 24, and then commenced a series of questions that "followed [Policy 602] almost exactly." App. 9 n.5 (Sanders, J., dissenting). This part of the call began with the following exchange:

911 Operator:	. . . Do you know his last name?
Complainant:	It's Davis.
911 Operator:	Davis? Okay, What's his first name?
Complainant:	Adr[i]an.
911 Operator:	What is it?
Complainant:	Adrian.
911 Operator:	Adrian.
Complainant:	Yeah.
911 Operator:	Okay. What's his middle initial?
Complainant:	Martell. . . .

App. 24-25. Later in the interview, which lasted about four minutes, McCottry also provided the operator Davis' birthdate and said that she had a protection order against him. App. 26-27. When the operator asked McCottry at one point whether she needed an "aid car," she answered, "No, I'm all right." App. 25.[1]

Two police officers arrived at McCottry's house minutes after the 911 call ended. "They noted that McCottry was still very upset and had what appeared to be fresh injuries on her forearm and her face." App. 3. The police later arrested Davis.

---

[1] A transcript of the 911 call, as it ultimately was admitted into evidence at trial, is attached at App. 24-27. Three passages from the call, in which McCottry repeatedly tells the operator that the police were at her house two days ago and that there should be a warrant for Davis' arrest, were redacted for trial on the ground that their prejudicial effect outweighed their probative value. The trial court, of course, had the entire 911 call before it when it made its pretrial Confrontation Clause and hearsay rulings.

3. The State charged Davis with one count of violating a domestic no-contact order, Wash. Rev. Code § 26.50.110(1) & (4), a charge that the State made a felony by including a special allegation that Davis assaulted McCottry. App. 7. McCottry did not appear for trial, and the State did not attempt to prove that she was unavailable. Report of Proceedings (Sept. 4, 2001), at 35. Instead, in a pretrial hearing, the prosecution asked the trial court to rule that the statements McCottry made during the 911 call and later to the responding police officers were admissible as "excited utterances" under state hearsay law regardless of McCottry's availability.

The trial court excluded McCottry's later statements to the officers but ruled, over Davis' objection, that the entire 911 interview was admissible because McCottry's answers to the operator's questions were excited utterances. The trial court further rejected Davis' argument that McCottry's statements failed the multi-factor reliability framework that Washington used at the time to assess Confrontation Clause objections. *Cf. Crawford,* 541 U.S. at 63 (referencing this multi-factor test).

At trial, the State presented testimony from only two live witnesses, the two police officers who had responded to McCottry's call. The prosecutor also played the 911 tape. Davis' attorney argued in closing that there was insufficient evidence to convict. She emphasized that the only evidence suggesting Davis was ever in McCottry's house on the day at issue, McCottry's statements during the 911 call, had not been given in court, under oath, or even subject to cross-examination. Report of Proceedings (Sept. 5, 2001), at 48. The prosecutor offered the following rebuttal:

> [Davis' attorney] would like you to believe that . . . no one you heard from saw this crime. That is not true. You have the voice of Ms. McCottry on that 911 tape. She reported it right when it happened.

> [J]ust consider that there was a person present and that person is Ms. McCottry and although she is not here today to talk to you she left you something better. *She left you her testimony on the day that this happened.* February 1st, 2001, this shows that the defendant, Adrian Davis was at her home and assaulted her. It is right here in her voice.

Id. at 55 (emphasis added). The prosecutor then played the 911 tape again, quickly summarized how this "testimony" established the elements of the crime charged, and rested her case. *Id.* at 55-56. The jury returned a guilty verdict.

4. The Washington Court of Appeals affirmed Davis' conviction. As is relevant here, the Court of Appeals held that the trial court properly classified McCottry's answers to the 911 operator's questions as excited utterances. App. 15-16. It also held that the State's use of the 911 tape satisfied the requirements of the Sixth Amendment's Confrontation Clause under the then-controlling constitutional framework established in *Ohio v. Roberts*, 448 U.S. 56 (1980). The *Roberts* framework provided that any out-of-court statements falling within a "firmly rooted" hearsay exception were sufficiently reliable to be offered against the accused, and that the excited utterance exception was a firmly rooted one. App. 16.

5. The Washington Supreme Court granted Davis' petition for discretionary review. While the case was pending, this Court abandoned the *Roberts* framework and held in *Crawford v. Washington*, 541 U.S. 36 (2004), that the Confrontation Clause bars the use of "testimonial" hearsay against criminal defendants unless the declarants are unavailable and the defendants had a prior opportunity to cross-examine them. The Washington Supreme Court received supplemental briefing and held a second oral argument concerning whether the State's use of the 911 call contravened *Crawford*.

The Washington Supreme Court held, by an 8-1 vote, that "the information essential to the prosecution of this case was McCottry's initial identification of Davis as her assailant" and that that identification was "nontestimonial and properly admitted." App. 7. The majority first discussed a California appellate decision saying it was doubtful whether there could exist "any circumstances under which a statement qualifying as an excited utterance would be testimonial." App. 5 (citing *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. App. 2004)). Without resolving this doubt, the majority then stated that a 911 call "must be scrutinized to determine whether it is a call for help to be rescued from peril or is generated by a desire to bear witness." App. 5. Apparently positing that every 911 call could neatly be characterized as one or the other, the majority concluded that McCottry's identification of Davis was nontestimonial because "there is no evidence that McCottry sought to 'bear witness' in contemplation of legal proceedings." App. 7.

Justice Sanders dissented. He found it irrelevant that McCottry's responses to the 911 operator's questions to identify her alleged assailant qualified as excited utterances. App. 10. In addition, the dissent rejected the majority's test requiring an inquiry into the subjective intent of 911 callers. It read *Crawford* to "dictate[] an objective standard," focusing on "whether the statement fulfills the function of prosecution testimony." App. 8 (quotation omitted). The dissent found it "clear that the 911 call in this case fulfilled th[at] function." App. 9. "[A] reasonable person today who calls 911 in connection with a criminal act could anticipate that his or her statement would be used in investigating and prosecuting a crime." App. 9.

REASONS FOR GRANTING THE WRIT

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court abandoned its prior framework for assessing Confrontation Clause claims and held that "testimonial" statements may not be introduced at trial against criminal defendants unless the declarants are unavailable and the defendants had an opportunity to cross-examine them. This Court expressly declined to offer a "comprehensive" definition of testimonial. *Id.* at 68. But it did note that the victim's statements in *White v. Illinois*, 502 U.S. 346 (1992), "to an investigating police officer admitted as spontaneous declarations" were "testimonial" and "arguably" should have been excluded by the Confrontation Clause. *Crawford*, 541 U.S. at 58 n.8.

In the sixteen months since *Crawford*'s paradigm shift, federal and state courts have adopted divergent views of the term "testimonial." The single issue over which these courts have divided most deeply (in three different ways, in fact) is whether alleged victims' statements similar to those in *White* – that is, statements to governmental agents describing criminal conduct that allegedly occurred minutes ago – are testimonial. State courts regularly classify such statements to 911 operators or responding police officers as spontaneous declarations (also known as "excited utterances") under their hearsay law, so the constitutionality of using them against defendants when the declarants do not appear at trial presents a vitally important issue concerning the administration of criminal justice.

This Court should take this opportunity to resolve this issue. *Crawford*'s testimonial principle is applied on a daily basis in courts across the Nation, and courts and practitioners are urgently in need of further guidance concerning how far the rule extends. Indeed, the growing number of appellate decisions like the one here – which exempt from *Crawford*'s reach most any statement that modern hearsay law characterizes

as an excited utterance – are already affecting prosecutorial and law enforcement practices. Prosecutors are urging 911 and other crime-detecting agencies to "develop protocols for identifying and recording excited utterances," on the assumption that obtaining victims' statements while they are still under the influence of startling events is sufficient to "get around *Crawford*." Wendy Murphy, *New Strategies for Effective Child Abuse Prosecutions After* Crawford, 23 ABA Child Law Practice 129, 129 (Oct. 2004) (discussing police department protocols); *see also* Erin Leigh Claypoole, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases Without a Victim,* 39 Prosecutor 18, 20-21 (Feb. 2005) (911 protocols). Because this narrow conception of *Crawford* ignores the decision's discussion of *White* and is in serious tension with the core value of adversarial testing that the testimonial principle is designed to vindicate, this Court should act promptly to address its propriety and to elucidate the testimonial principle with greater specificity.

A. Courts Are Deeply Divided Over Whether Alleged Victims' Statements To Governmental Agents Describing Recent Criminal Activity – Admitted As Excited Utterances Under A Jurisdiction's Hearsay Law – Constitute "Testimonial" Statements.

In *Crawford v. Washington,* this Court abandoned its prior conception of the Confrontation Clause in favor of the "testimonial approach." Under the prior approach, encapsulated in *Ohio v. Roberts,* 448 U.S. 56 (1980), the prosecution could use any out-of-court statement against a defendant that the trial court found to be sufficiently reliable. This reliability inquiry turned on whether the statement fell within a "firmly rooted" hearsay exception, such as the exception for excited utterances, or bore "particularized guarantees of trustworthiness." *Id.* at 66. Now, however, "[w]here *testimonial* evidence is at issue, . . . the Sixth Amendment demands what the common law required:

unavailability [of the declarant] and a prior opportunity for cross-examination." *Crawford,* 541 U.S. at 68 (emphasis added). When testimonial evidence is at issue, in other words, it is immaterial whether the proffered evidence falls within a "firmly rooted" hearsay exception or otherwise appears substantively reliable.

The *Crawford* Court noted three potential formulations of the term "testimonial," *id.* at 51-52, and it held that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to [statements given during] police interrogations." *Id.* at 68. The latter category, this Court explained, includes, at the very least, recorded statements given "in response to structured police questioning." *Id.* at 53 n.4.

This Court also noted that the "statements of a child victim to an investigating police officer admitted as spontaneous declarations" in *White v. Illinois,* 502 U.S. 346 (1992), were "testimonial statements" whose use at trial "arguably" violated the Confrontation Clause. *Crawford,* 541 U.S. at 58 n.8. But this Court did not dwell on this issue at length, for the statement at issue in *Crawford* itself was a recorded statement given during a custodial interrogation and thus was unquestionably inadmissible. *See id.* at 53 n.4, 68. Indeed, the *Crawford* opinion concluded by expressly "leav[ing] for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. This Court acknowledged that this "refusal to articulate a comprehensive definition" would cause "interim uncertainty," but suggested this uncertainty could, and would, be alleviated by expounding on the testimonial principle in future cases. *Id.* at 68 n.10.

The uncertainty the *Crawford* opinion created has come to fruition most acutely in the realm of statements like those at issue in *White* – alleged victims' "excited utterances"

to 911 operators, police officers, or other governmental agents describing criminal activity that allegedly occurred minutes ago. This Court has granted certiorari, vacated, and remanded one decision involving such a statement for further consideration in light of *Crawford*. *Siler v. Ohio*, 125 S. Ct. 671 (2004) (No. 04-6765), *GVR'ing State v. Siler*, 2003 WL 22429053 (Ohio App. 2003). But this Court has not yet addressed in a post-*Crawford* case on the merits whether these types of statements – or any other types of statements – are testimonial.

Meanwhile, courts – sometimes in the same jurisdiction – have divided three different ways over whether excited utterances describing recent criminal activity to a governmental agent are testimonial. The first group of courts from five jurisdictions holds that such a statement's status under modern hearsay law as an excited utterance automatically places it beyond *Crawford*'s reach. *See United States v. Luciano*, ___ F.3d ___, Slip Op. at 12-13 & n.3 (1st Cir. July 8, 2005) (statement is not testimonial when it is "an excited utterance"); *State v. Anderson*, 2005 WL 171441, at *4 (Tenn. App. Jan. 27, 2005) (publication designation pending) (excited utterances to responding officers "cannot be testimonial"); *People v. King*, ___ P.3d ___, 2005 WL 170727, at *4-6 (Colo. App. Jan. 27, 2005) (while classification may not be "dispositive" in other contexts, excited utterances to responding officers are, by definition, nontestimonial); *State v. Cannaday*, 2005 WL 736583, at *6 (Ohio App. March 31, 2005) (unpublished opinion) (*Crawford* does not apply to statements "that are . . . subject to common-law exceptions to the hearsay rule, such as excited utterances")[2]; *State v. Wright*, 686 N.W.2d 295, 302 (Minn. App.) (911 call nontestimonial; suggesting that statement to responding officer

[2] *See also City of Akron v. Hutton*, 2005 WL 1523880, at ¶¶ 15-17 (Ohio App. June 29, 2005) (unpublished opinion) (reaffirming this approach).

also was nontestimonial because a statement's status as an excited utterance "is inconsistent with a determination" that it is testimonial), *review granted* (Minn. 2004).[3] Two family court judges also have published an article taking this position in the national journal for such judges. *See* Judge Amy Karan & Judge David M. Gersten, *Domestic Violence Hearsay Exceptions in the Wake of* Crawford v. Washington: *A View From the Bench*, 13 Juvenile & Family Just. Today 20, 22 (Summer 2004) <http://www.ncdsv.org/images/ DVHearsayExceptionsWakeCrawford.pdf>. Courts taking this position reason, as the Tennessee Court of Appeals put it, that "[b]ecause an excited utterance is a reactionary event of the senses made without reflection or deliberation, it cannot be testimonial in that such a statement has not been made in contemplation of its use in a future trial." *Anderson*, 2005 WL 171441, at *4. Accordingly, these courts have established a categorical rule that when an alleged victim makes an excited utterance to a governmental agent, "in a noncustodial setting without indicia of formality, the statement is nontestimonial." *King*, ___ P.3d at ___, 2005 WL 170727, at *6.

A second group of courts, including the Washington Supreme Court here, from seventeen jurisdictions has rejected (sometimes explicitly and sometimes implicitly) the position that all "excited utterances" describing recently completed crimes to governmental agents are exempt from *Crawford*'s reach. Instead, these courts hold, in general terms, that whether such statements are testimonial depends on the speakers' supposed purposes in making them and the governmental agents' actions at the time. *See* App. 5-7 (911 call; nontestimonial); *Leavitt v. Arave*, 383 F.3d 809, 830 n.22 (9th Cir.

---

[3] *See also State v. Wright*, 2005 WL 147487, at *3-4 (Minn. App. Jan. 25, 2005) (unpublished opinion) (responding officer; nontestimonial), *review denied* (Minn. 2005).

2004) (911 call and statement to responding officer; nontestimonial), *cert. denied*, 125 S. Ct. 2540 (2005)[4]; *Mungo v. Duncan*, 393 F.3d 327, 336 n.9 2d Cir. 2004) (responding officer; dicta suggesting initial statements nontestimonial and subsequent statements testimonial); *State v. Greene*, 874 A.2d 750, 771-76 (Conn. 2005) (responding officer; nontestimonial); *Hammon v. State*, ___ N.E.2d ___, 2005 WL 1406007, at *1 (Ind. June 16, 2005) (responding officer; nontestimonial); *State v. Hembertt*, 696 N.E.2d 473, 482-83 (Neb. 2005) (responding officer; initial statements nontestimonial, but suggesting statements a few minutes later were testimonial); *Stancil v. United States*, 866 A.2d 799, 809 (D.C. 2005) (responding officer; remanded for additional factfinding)[5]; *State v. Barnes*, 854 A.2d 208, 211 (Me. 2004) (statement at police station; nontestimonial); *People v. Diaz*, ___A.D. ___, 2005 WL 1514448, at *4-6 (N.Y. App. June 28, 2005); *State v. Ruth*, ___ S.W.3d ___, 2005 WL 1431324, at *6-7 (Tex. App. June 21, 2005) (911 call; nontestimonial)[6]; *Anderson v. State*, 111 P.3d 350 (Alaska App. 2005) (responding officer; nontestimonial); *People v. Walker*, 697 N.W.2d 159, 161-66 (Mich.

---

[4] *See also Massey v. Lamarque*, 2005 WL 1140025 (9th Cir. May 9, 2005) (unpublished opinion) (applying *Leavitt* to hold that "spontaneous statement in the 911 tape was not testimonial").

[5] *See also Drayton v. United States*, ___ A.2d ___, 2005 WL 1413862 (D.C. June 16, 2005) (responding officer; testimonial).

[6] *See also Marc v. State*, ___ S.W.3d ___, 2005 WL 1294969, at *10 (Tex. App. June 2, 2005) (responding officer; nontestimonial); *Spencer v. State*, 162 S.W.3d 877, 881-83 (Tex. App. 2005) (responding officer; nontestimonial); *Davis v. State*, 2005 WL 183141, at *4 (Tex. App. Jan. 27, 2005) (unpublished opinion) (responding officer; nontestimonial); *Wilson v. State*, 151 S.W.3d 694, 697-98 (Tex. App. 2004) (responding officer; nontestimonial), *review denied* (Tex. 2005). One division of the Texas Court of Appeals has adopted an almost categorical approach, holding that "the underlying rationale of an excited utterance supports a determination that it is not testimonial in nature" because it is "likely to be truthful" and not made "in contemplation of its use in a future trial." *Key v. State*, ___ S.W.3d ___, 2005 WL 467167, at *5 (Tex. App. Feb. 28, 2005), *review denied* (Tex. June 29, 2005).

App.) (2-1 decision) (responding officer; nontestimonial), *appeal granted* (Mich. June 17, 2005)[7]; *State v. Alvarez*, 107 P.3d 350, 354-56 (Ariz. App. 2005) (responding officer; nontestimonial); *Commonwealth v. Gray*, 867 A.2d 560, 577 (Pa. App. 2005) (responding officer; initial statement testimonial; statement ten minutes later unresolved); *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. App. 2004) (911 call and statement to responding officer; nontestimonial)[8]; *State v. Forrest*, 596 S.E.2d 22, 27 (N.C. App. 2004) (2-1 decision) (responding officer; nontestimonial), *aff'd*, 611 S.E.2d 833 (N.C. 2005) (per curiam); *Packer v. State*, ___ So.2d ___, 2005 WL 1252752 (Ala. Crim. App. May 27, 2005) (911 call and statements to responding officer; nontestimonial).

Two of these decisions – one in the 911 context and one in the responding officer context – are representative. In the decision below, the Washington Supreme Court reasoned that excited-utterance statements in 911 calls must be scrutinized on a case-by-case basis "to determine whether [the 911 call] is a call for help to be rescued from peril or is generated by a desire to bear witness." App. 5. When the caller is motivated by the former, her description of criminal activity is not testimonial, no matter how much it "assist[s] police in investigation or assist[s] the State in prosecution." *Id.*; *see also* App. 7 (statement not testimonial even though it was "essential to the prosecution of this case").

---

[7] *See also People v. Bryant*, 2004 WL 1882661, at *1 (Mich. App. Aug. 24, 2004) (unpublished opinion) (responding officer; nontestimonial); *People v. Bechtol*, 2004 WL 2726076, at *3 (Mich. App. Nov. 30, 2004) (unpublished opinion) (responding officer; nontestimonial).

[8] *See also People v. Cage*, 15 Cal. Rptr. 3d 846, 856-57 (Cal. App.) (alleged victim's statements to officer at hospital shortly after event not testimonial), *review granted* (Cal. 2004); *People v. Caudillo*, 19 Cal. Rptr. 3d 574 (Cal. App. 2004) (911 call not testimonial); *People v. Kilday*, 20 Cal. Rptr. 3d 161 (Cal. 2004), *review granted* (Cal. 2005) (initial statements to responding officers nontestimonial, but statements after the scene is "secure" testimonial).

In the same vein, the Nebraska Supreme Court recently held that "some excited utterances [to responding officers] are testimonial and others are not, depending upon the circumstances." *Hembertt*, 696 N.W.2d at 480. When a scene has been assessed and secured, statements officers obtain acting in their "investigatorial capacit[ies] in anticipation of an eventual criminal prosecution" are testimonial. *Id.* at 482-83. But while the police are attempting to "assess the situation and secure the scene," any statements witnesses make describing the crime that just occurred – whether or not they are in response to officers' "preliminary questions" – are not testimonial. *Id.*

Even within this group of courts, however, significant disagreement exists regarding how to conduct the inquiries into declarants' motivations and governmental agents' actions. As one commentator recently summarized the situation:

> Courts that scrutinize victims' [excited utterances] to responding officers look to a long list of considerations, and apply those considerations inconsistently. For example, some courts hold that the informality of communication between the declarant and the police is a factor that militates in favor of admissibility; other courts flatly reject this notion. Some courts focus on whether an adversarial relationship exists between the declarant and the police; this consideration is immaterial in other courts. . . . Some courts hold that the declarant's initiation of communication with police makes her statement nontestimonial; other courts do not treat such statements any differently from police initiated conversation. Some courts imply that a statement is not testimonial when officers listen passively; other courts do not ascribe much significance to the ardor of the officers' questioning. . . .
>
> [Courts also] show varying interest in the intent of the parties to the conversation. Some courts place great emphasis on the motivation of the interviewers to gather evidence; other courts show little interest in the motivation of the interviewers. Some courts find a statement to be nontestimonial if the declarant's primary motive was not to provide a statement for use by the prosecution, but rather to

> avoid imminent danger; other courts reject the "primary motivation" test . . . .

Tom Lininger, *Prosecuting Batterers After* Crawford, 91 Va. L. Rev. 747, 779-80 (2005) (footnotes and citations omitted). This group of courts, in short, accepts that not all excited utterances are testimonial but also refuses – for various, often internally inconsistent reasons – to hold that all statements knowingly describing recently completed criminal conduct to governmental agents are testimonial.

In direct contrast to the first two groups of courts, courts in eleven jurisdictions have held, as the dissent below argued, that statements alleged victims make to 911 operators or responding officers describing recently completed criminal activity are testimonial, regardless of whether they constitute excited utterances and regardless of the victims' or governmental agents' supposed motives at the time. *See* App. 8-11 (Sanders, J., dissenting); *United States v. Arnold*, ___ F.3d ___, 2005 WL 1431484 (6th Cir. June 21, 2005) (911 call and statements to responding officers identifying assailant); *Moody v. State*, 594 S.E.2d 350, 353-54 & nn.5-6 (Ga. 2004) (alleged victim's statements to responding officer)[9]; *Lopez v. State*, 888 So.2d 693, 700 (Fla. App. 2004) (responding officer)[10]; *Mason v. State*, ___ S.W.3d ___, 2005 WL 1531286 (Tex. App. June 30, 2005) (responding officer); *State v. Grace*, 111 P.3d 28, 30-31, 38 (Haw. App.) (responding officer), *cert. denied* (Haw. 2005); *State v. Hill*, 827 N.E.2d 351, 358-59 (Ohio App.

---

[9] *See also Senior v. State*, ___ S.E.2d ___, 2005 WL 1208102, at *2 (Ga. App. May 23, 2005) (statement to responding fire investigator); *Miller v. State*, ___ S.E.2d ___, 2005 WL 1423393, at *2 (Ga. App. June 20, 2005) (responding officer; nontestimonial).

[10] *See also Howard v. State*, ___ So.2d ___, 2005 WL 1248965 (Fla. App. May 27, 2005) (victim's excited utterance to responding officer identifying assailant); *Manuel v. State*, ___ So.2d ___, 2005 WL 1130183 (Fla. App. May 16, 2005) (same).

2005) (statement to responding officer identifying assailant)[11]; *People v. Victors*, 819 N.E.2d 311, 320 (Ill. App. 2004) (majority opinion & O'Malley, P.J., concurring) (victim's statements to responding officers "at the scene of the alleged incident mere minutes after the incident supposedly occurred"), *appeal denied*, ___ N.E.2d ___ (Ill. Mar. 30, 2005)[12]; *State v. Clark*, 598 S.E.2d 213, 217 (N.C. App.) (responding officer), *review denied*, 601 S.E.2d 866 (N.C. 2004)[13]; *People v. Cortes*, 781 N.Y.S.2d 401, 415 (N.Y. Sup. Ct. 2004) (911 call)[14]; *Heard v. Commonwealth*, 2004 WL 1367163, at *3-5 (Ky. App. June 18, 2004) (unpublished opinion) (alleged victim's statements to responding police officer identifying assailant), *review granted* (Ky. 2004); *People v. Adams*, 16 Cal. Rptr. 3d 237, 244 (Cal. App) (responding officer), *review granted* (Cal. 2004); *see also United States v. Andrews*, 2005 WL 1395049, at *2 (11th Cir. June 14, 2005) (unpublished opinion) ("assuming" that statement to 911 operator identifying

---

[11] *State v. Lee*, 2005 WL 1540575, at ¶¶ 13-14 (Ohio App. July 1, 2005) (publication designation pending) (statement to responding officer identifying assailant).

[12] In another case, the Illinois Court of Appeals stated it was adopting a case-by-case approach, but held, contrary to the Washington Supreme Court here and other courts in the second group above, that statements made in response to a 911 operator's questions to describe alleged assailants or criminal conduct are, by definition, testimonial. *People v. West*, 823 N.E.2d 72, 81-82 (Ill. App. 2005). Explaining that "a court should examine a caller's statement in the same manner it would a victim's statement to a treating medical professional," *id.* at 81, the Illinois Court of Appeals referred to a prior decision holding that a victim's statements describing her physical condition are not testimonial but – in direct opposition to the Washington Supreme Court here – that statements "identifying respondent as the perpetrator" are testimonial. *In re T.T.*, 815 N.E.2d 789, 803-04 (Ill. App. 2004).

[13] *See also State v. Lewis*, 603 S.E.2d 559, 562-63 (N.C. App.) (victim's statement to responding officer), *review allowed and appeal dismissed*, 605 S.E.2d 638 (N.C. 2004).

[14] *See also People v. Dobbin*, 791 N.Y.S.2d 897 (N.Y. Sup. Ct. 2004). Prior to the state Supreme Court weighing in, a lower New York court had held that statements describing a crime to a 911 operator were not testimonial. *See People v. Moscat*, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

assailant was testimonial); *State v. Rapp*, 2005 WL 1397205, at *1-2 (Iowa App. June 15, 2005) (unpublished opinion) ("[a]ssuming" 911 call to report domestic violence incident was testimonial). Consequently, these courts exclude statements made "under the same or similar circumstances" as even the courts employing a case-by-case approach to excited utterances. *Davis v. State*, ___ S.W.3d ___, 2005 WL 1173964, at *6 (Tex. App. May 19, 2005) (collecting and discussing several "conflicting decisions").[15]

Once again, two cases are fairly representative. In holding that an alleged victim's 911 call and statements minutes later to responding officers were testimonial, the Sixth Circuit reasoned:

> Although one purpose of the 911 call may have been to secure assistance, it remains that [the caller] could also reasonably expect the statements to be used in a future trial. In addition, [the caller's] statements were declarations made for the purpose of "establishing or proving some fact." [*Crawford*, 541 U.S. at 51] (quotation and citation omitted). It would be antithetical to this entire examination were the government to suggest that [the caller] made the statements for any other reason than to establish that the alleged incident occurred.

Arnold, ___ F.3d at ___; 2005 WL 1431484, at *6. Turning back the dissent's argument that excited utterances to 911 operators and responding officers should be assessed, as the Washington Supreme Court held, on a "case-by-case basis" according to declarants' subjective motivations, *id.* at *16-18 (Sutton J., dissenting), the Sixth Circuit ruled categorically that statements "made knowingly to authorities, describ[ing] criminal activity" are testimonial. *Id.* at *6; *see also Cortes*, 781 N.Y.S.2d at 415 (a 911 call that

---

[15] It also bears mention that the New Jersey Supreme Court recently held, contrary to some prior suggestions in state law, that an alleged victim's statements to a responding officer ten minutes after the incident could not be admitted as excited utterances. *State v. Branch*, 865 A.2d 673 (N.J. 2005). The court stated its holding was "informed by" the Sixth Amendment principles enunciated in *Crawford*. *Branch*, 865 A.2d at 690.

reports criminal activity is testimonial; "it makes no difference what the caller believes"). In another case involving a victim's statements to a responding officer, the Florida Court of Appeals has reasoned quite simply that telling a police officer that someone just committed a crime "does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made." *Lopez*, 888 So.2d at 699-700.

There can be no doubt that the law in this area is in total disarray. Post-*Crawford* cases involving excited utterances made to 911 operators and responding officers are generating a sprawling patchwork of confusion and contradictions. This Court is the only institution that can bring order to the escalating turmoil in the lower courts.

B. The Decision Below Interprets *Crawford*'s Testimonial Principle Too Narrowly.

The Washington Supreme Court's decision – like other courts' decisions holding that alleged victims' excited-utterance statements to governmental agents describing crimes that just have occurred are not testimonial – refuses to come to grips with the paradigm shift that *Crawford* effectuated. *Crawford*'s testimonial principle reinvigorates the Confrontation Clause's fundamental commitment, as Justice Thomas put it years earlier, to the "adversary process." *White*, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment); *see also Crawford*, 541 U.S. at 42-52. It requires that the Clause be interpreted at all times with its original "focus" in mind – namely, prohibiting the use of "*ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50.

The practice of trying defendants based on statements alleged victims give to 911 operators or responding officers is antithetical to the adversarial process the testimonial principle is designed to protect. The 911 service contractor in this case describes its

interactions with alleged victims as "police incident interviews," App. 21, and rightfully so: Operators, as agents of the State, carry out such interviews not only for the purpose of facilitating responses to any needs for assistance but also to begin gathering information that may be useful in the police's investigating and the State's prosecuting criminal cases. The identity of an alleged offender is foremost among such useful information. The police, of course, may use these interviews to further their investigations, but if the prosecution attempts to use them as substantive evidence of guilt in a criminal trial, the Confrontation Clause's concerns respecting the inadequacies of *ex parte* examinations, and the need to subject witness testimony to cross-examination, come squarely into play.

The Washington Supreme Court nevertheless held the statements the alleged victim, Michele McCottry, made identifying her alleged assailant were not testimonial for three primary reasons: (1) it is "difficult to perceive any circumstances under which a statement qualifying as an excited utterance would be testimonial," App. 5 (citing *Corella,* 18 Cal. Rptr. 3d at 776); (2) McCottry supposedly called 911 "because of an immediate danger" rather than to "assist the police in investigation or assist the State in prosecution," App. 5, 7; and (3) more generally, a 911 interview is "not of the same nature" as *ex parte* examinations in the civil law mode. App. 5.

A proper understanding of *Crawford* demonstrates that none of these reasons for holding that McCottry's statements were not nontestimonial has merit.

1. That an alleged victim's statements describing criminal activity to a governmental agent qualify as excited utterances under a jurisdiction's hearsay law neither suggests (as the Washington Supreme Court indicated) nor automatically means

(as other courts have held) that they are exempt it from *Crawford*'s reach. *Crawford* made clear that the right to confrontation is a procedural right; it no longer turns on "the vagaries of the rules of evidence." 541 U.S. at 61; *see also United States v. Cromer*, 389 F.3d 662, 677 (6th Cir. 2004) ("If there is one theme that emerges from *Crawford*, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admissibility of hearsay statements."). Accordingly, as the dissent below recognized (App. 10), the dangers that require statements with testimonial characteristics to be subjected to cross-examination "do[] not evaporate" when the statements "happen to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." *Crawford*, 541 U.S. at 56 n.7; *see also* Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 547 (2005) ("[T]here is no theoretical basis to assume that, simply because a statement falls within a modern-day exception, it was intended to be excluded from protection of the Confrontation Clause if it has testimonial characteristics.").

That is precisely the case with respect to "excited utterances," such as those here, made in response to a governmental agent asking who committed a potential crime. As *Crawford* noted, the scope of the hearsay rule when the Sixth Amendment was adopted sheds light on the reach of the testimonial principle, *id.* at 55-56, and "to the extent the hearsay exception for spontaneous declarations existed at all [in 1791], it required that the statements be made immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage." *Id.* at 58 n.8 (alterations in original; quotation and citation omitted). If a startling or stressful incident was complete

– even if it ended only minutes before – statements answering questions or describing the incident were not admissible. *See* Richard D. Friedman and Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171, 1212-16 (2002) (collecting historical sources). This rule against admitting narrations of completed events remained firm into the twentieth century. *See id.* at 1216-20.

The modern version of the excited utterance exception, however, "is much more expansive" than the exception was for most of our history, "and only a few of the statements currently received under it would likely meet that more limited historical antecedent." Mosteller, 39 U. Rich. L. Rev. at 577 (footnote omitted); *see also* Friedman & McCormack, 150 U. Pa. L. Rev. at 1217-23. Washington courts, for example, have acknowledged that Washington's modern excited utterance rule "is not as restrictive as the requirements of the common law exception," *State v. Dixon*, 684 P.2d 725, 728 (Wash. App. 1984), and have held that alleged victims' statements made several minutes or hours after upsetting incidents can constitute excited utterances, even if made in response to governmental agents' questions. *See State v. Thomas*, 83 P.3d 970, 987 (Wash. 2004) (collecting examples); *State v. Williamson*, 996 P.2d 1097, 1102-03 (Wash. App. 2000) (victim's statements at police station after being promised suspect would be arrested constituted excited utterances); *State v. Morrison*, 1999 WL 429806 (Wash. App. 1999) (unpublished opinion) (statements in interview with police officer four to five hours after incident were excited utterances). Most other states in modern times have developed similarly broad excited utterance rules. *See, e.g., Spencer*, 162 S.W.3d 881 ("Texas courts have held that a declarant's state of excitement can last long after the initial crime and that excited utterances can be made both spontaneously or in response to

questioning."); *Stancil*, 866 A.2d at 808 (recounting modern expansion of exception in District of Columbia); *People v. Brown*, 517 N.E.2d 515, 517-522 (N.Y. 1987) (same in New York and other jurisdictions).

Wigmore, whose modern treatise on evidence advocated a broad formulation of the excited utterance exception, openly acknowledged that narrative statements describing past events were "testimonial," as he used that term. 6 John Henry Wigmore, Evidence § 1746, at 194 (J. Chadbourn ed. 1976); *see also id.* § 1756.[16] But even when the interviewers were governmental agents, Wigmore did not perceive this as posing a Confrontation Clause problem because he thought the Clause did "not prescribe what kinds of testimonial statements . . . shall be given infrajudicially – this depends [exclusively] on the law of evidence for the time being." 3 *id.* at § 1397; *see also Crawford*, 541 U.S. at 50-51 (reciting Wigmore's view).

---

[16] Wigmore said:

> Whenever, therefore, an [excited] utterance *is* used as testimony that the *fact asserted in it did occur* as asserted, i.e., on the credit of the speaker as a credible person, it is being used testimonially, and is within the [general] prohibition of the hearsay rule.
>
> Now this testimonial use is precisely the use that is made of the present class of statements. . . . [T]hey clearly do involve the testimonial use of the assertion to prove the truth of the fact asserted – for example, *when the injured person declares who assaulted him* or whether the locomotive bell was rung, or when the bystander at an affray exclaims that the defendant shot first. Such statements are genuine instances of using a hearsay assertion testimonially; i.e., we believe that Doe shot the pistol, or that the bell was rung, *because* the declarant so asserts – which is essentially the feature of all human testimony.

Wigmore, *supra*, at §1746, at 194 (emphasis added).

Although Wigmore's understanding of the Confrontation Clause – and, relatedly, the *Roberts* framework – gave states like Washington open field running to use expansive excited utterance exceptions to prosecute criminal cases, *Crawford* does not. *Crawford* expressly rejects Wigmore's limited view of the confrontation right and demands of *all* testimonial statements "what the common law required." 541 U.S. at 50-51, 68. The common law precluded the admission of a victim's description of a completed crime to a governmental agent in the absence of a showing of unavailability and an opportunity to cross-examine. Consequently, so does the Confrontation Clause.

2. The Washington Supreme Court's majority also erred in reasoning that McCottry's identification of Davis was nontestimonial because "[t]here is no evidence that McCottry sought to 'bear witness' in contemplation of legal proceedings." App. 7. As the dissent and other courts have noted, *Crawford*'s "focus on reasonableness dictates an objective standard, evaluated by whether a reasonable person would 'expect [the statement] to be used prosecutorially,' not a subjective determination of whether the 911 caller actually knew his or her statement would be used prosecutorially." App. 8 (Sanders, J., dissenting) (quoting *Crawford*, 541 U.S. at 51-52); *see also, e.g., Cromer*, 389 F.3d at 675 (inquiry must be based on a "reasonable person in declarant's position").

Indeed, in countless areas of constitutional criminal procedure, this Court has shunned subjective inquiries in favor of objective standards. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 430-31, 442 & n.35 (1984) ("in custody" requirement for Fifth Amendment's *Miranda* rule); *Rhode Island v. Innis*, 446 U.S. 291 (1980) ("interrogation" standard for Fifth Amendment's *Miranda* rule); *Florida v. Bostick*, 501 U.S. 429, 437 (1991) ("seizure" standard under Fourth Amendment). The reasons for favoring

objective standards – efficiency, certainty, and consistency – apply, if anything, with more force here. The very reason confrontation issues arise in the first place is because certain witnesses are not present to testify. The idea, therefore, that courts should estimate those witnesses' "perception[s] of [their] situation[s]" at the time they gave their out-of-court statements ignores a fundamental teaching of Crawford – that "[o]nly cross-examination could reveal [those perceptions]." 541 U.S. at 66.

What is more, the Washington Supreme Court's rule dividing 911 statements seeking help from danger from those seeking to "assist the police in investigation" sets up a demonstrably false dichotomy. The truth is that almost all 911 calls contain an element of each. The typical caller wants some kind of help and probably realizes she is making statements that might reasonably be used for investigative or prosecutorial purposes. Pretending, as the Washington Supreme Court does, that the spectrum of 911 calls – and the spectrum of statements within such calls – can be neatly divided between those that seek to get help and those that seek to trigger prosecutorial action invites judicial manipulation and idiosyncratic decision making – the very problems that plagued the *Roberts* framework. *Crawford*, 541 U.S. at 62-63; *see also Walker*, 697 N.W.2d at 170 (Cooper, J., dissenting) ("Determining whether a statement is testimonial in nature based on the declarant's state of mind is as amorphous as the reliability test of *Ohio v. Roberts*"; indeed, "it is merely a reliability analysis in disguise."); *United States v. Bordeaux*, 400 F.3d 548, 556 (8th Cir. 2005) (interview during forensic examination of victim that served both medical and law enforcement purposes was testimonial because "*Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial"). In this very case, in fact, the Washington Supreme Court majority did

nothing more than label McCottry's identification of Davis as "seeking assistance and protection from peril." App. 7. It never explained how identifying her alleged assailant could have furthered such purposes, and it ignored that McCottry specifically said she did *not* need an aid car. App. 25. Constitutional rights should not be so easily swept aside.

Employing an objective test – as Professor Richard Friedman, whose work this Court drew upon in *Crawford*, 541 U.S. at 61, advocates in his article applying the testimonial approach to 911 calls – would have forced the majority to grapple with several facts demonstrating that McCottry's statements were testimonial. "A reasonable person [who calls 911] knows she is speaking to officialdom – either police officers or agents whose regular employment calls on them to pass information on to law enforcement, from whom it may go to the prosecutorial authorities." Friedman & McCormack, 150 U. Pa. L. Rev. at 1242. It also is common knowledge that 911 calls are recorded and preserved for evidentiary purposes. App. 9 (Sanders, J., dissenting). This is especially so with respect to allegations that someone has engaged in criminal activity. Because "the contents of [such a] call are significant only as the caller's report of what has happened," they should be considered testimonial. Friedman & McCormack, 150 U. Pa. L. Rev. at 1243.

3. The final reason the Washington Supreme Court invoked to hold that McCottry's identification of Davis as her assailant was not testimonial – *i.e.*, that a 911 interview "is not of the same nature" as an *ex parte* examination, App. 5 – also misses the mark. When dealing, as here, with a type of out-of-court statement that did not exist at common law, it is useless to inquire whether the statement's descriptive characteristics mirror those of one of the particular abuses the Confrontation Clause meant to quell. *See*

Crawford, 541 U.S. at 52 n.3. The proper inquiry, grounded in the Framers' concern with guaranteeing an adversarial process, is a functional one: whether the statement that the accused is unable to challenge is being used at trial in a manner that "fulfills the function of prosecution testimony." App. 9 (Sanders, J., dissenting) (quoting Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* <http://www.personal.umich.edu/rdfrdman/Grappling1.pdf>, at 2 (2005)); *see also Arnold*, ___ F.3d at ___, 2005 WL 1431484, at *6.

There can be little doubt that McCottry's statements identifying Davis as her assailant satisfy this standard. The core function of prosecution testimony is to "establish[] or prove[] some fact," *Crawford*, 541 U.S. at 51 (quotation omitted) – ultimately, that a person committed a crime. McCottry's statements served exactly that function – so much so that the prosecutor told the jury in closing that "although Ms. McCottry is not here today to talk to you she left you something better. She left you *her testimony* on the day that this happened . . . th[at] shows that the defendant, Adrian Davis was at her home and assaulted her." Report of Proceedings (Sept. 5, 2001), at 55 (emphasis added). The Washington Supreme Court dismissed the prosecutor's characterization of McCottry's statements as irrelevant, App. 6, but at least one other court has held that a prosecutor's "colloquial" use of the word "testimony" to describe an absent witness's statements is a "a relevant factor in the calculus." *Stancil*, 866 A.2d at 814. At the risk of stating the obvious, such colloquial characterizations strongly suggest the proffered statements are serving the function of prosecution testimony.

This conclusion pertains, contrary to the Washington Supreme Court's suggestion (App. 5-6) and other courts' explicit statements (*e.g.*, *Corella*, 18 Cal. Rptr. 3d at 776),

regardless of whether a 911 operator's questioning "rise[s] to the level of an 'interrogation.'" *Id.* Nothing in *Crawford* limits the realm of testimonial statements to those produced during interrogations. To the contrary, *Crawford* says repeatedly that statements made during police interrogations are part of a class of "paradigmatic" or "core" testimonial statements, 541 U.S. at 52, 63, indicating that other types of statements also are testimonial. *See also id.* at 68 ("*Whatever else the term ['testimonial'] covers*, it applies *at a minimum* to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.") (emphasis added); *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (plurality opinion) (whenever "the government is involved in the statements' production and when the statements describe past events," the statements "implicate the core concerns of the old *ex parte* affidavit practice"). Indeed, *Crawford* also stated, without referring to any "interrogation" requirement, that the statements the alleged victim in *White* made "to an investigating police officer admitted as spontaneous declarations" were "testimonial statements." *Id.* at 58 n.8.

Neither the Washington Supreme Court nor any of the dozens of other appellate decisions from other jurisdictions – *not a single one* – holding that excited utterances to 911 operators or responding officers are not testimonial has even mentioned *Crawford*'s footnote concerning *White*, much less attempted to distinguish or reconcile it. It is impossible to know whether this collective silence is attributable to mere oversight or feigned ignorance. Regardless, it represents a rather extraordinary way to treat this Court's precedent. For once that footnote is absorbed, it is difficult to escape the conclusion that excited utterances like those at issue here are testimonial. *See, e.g.*, Lininger, 91 Va. L. Rev. at 773-82.

Lest there be any doubt, the police incident interview here, like "[m]ost 911 calls today" (App. 9 & n.5 (Sanders, J., dissenting)), was conducted according to a detailed script, designed to "obtain pertinent information" to facilitate a criminal inquiry, "such as where the incident occurred, what type of incident occurred, when the incident occurred, if weapons were involved, who was involved, why it occurred and the reporting party's information." App. 21; *accord Cortes*, 781 N.Y.S.2d at 405-07. The script generated, as the Washington Supreme Court put it, "*the information essential to the prosecution of this case*[,] McCottry's initial identification of Davis as her assailant." App. 5 (emphasis added). This degree of governmental involvement in producing the statements at issue is more than sufficient to trigger confrontation concerns. If prosecutors could try and convict defendants based solely on such 911 police incident interviews, the right to confrontation would be unable to serve its fundamental objective: requiring accusations of criminal conduct to be leveled in court proceedings, subject to adversarial testing.

Nor does it matter that 911 calls are "typically initiated by the victim." App. 5; *see also Spencer*, 162 S.W.3d at 882 (collecting other cases holding that "[i]nteraction with the police initiated by a witness or the victim is less likely to result in testimonial statements than if initiated by the police"). It has always been common ground that "the Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, *trials by anonymous accusers, and absentee witnesses*." *California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J., concurring) (emphasis added); *see also Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring) (emphasis added) ("*[A]n out-of-court accusation* is universally conceded to be constitutionally inadmissible against the accused."). Whether or not a person's accusation that someone committed a crime is

prompted by the government has nothing to do with whether the defendant has the right to confront his accuser.

Indeed, a rule exempting "victim initiated" accusations from *Crawford*'s reach would produce outrageous results. It would mean that anytime a person called 911 – or the police or district attorney's office – and reported a crime, the caller's statements would not be testimonial. It also would mean that a person could go to a police station to report a crime and, so long as the police were previously unaware of its commission, the complainant's accusation (if blessed by local hearsay law) would be admissible against the accused regardless of whether the complainant appeared at trial. These are not fanciful possibilities. The Maine Supreme Judicial Court, for example, already has ruled that statements an alleged assault victim made upon driving to the police station to report the crime were not testimonial because "she went to the police station on her own, not at the demand or request of the police." *Barnes*, 854 A.2d at 211; *see also Marc v. State*, ___ S.W.3d ___, 2005 WL 1294969, at *10 (Tex. App. June 2, 2005) (Victims' statements describing crime were not testimonial because "the officers did not seek out the victims for the purpose of investigating the offenses the victims eventually described."). And appellate courts in New York and California have held that "excited utterances" at field "showups" were not testimonial because the victim identified the assailants "spontaneously" (after the police orchestrated the encounters). *Diaz*, ___ A.D. at ___, 2005 WL 1514448, at *4; *People v. Jimenez*, 2004 WL 1832719, at *11 (Cal. App. Aug. 17, 2004) (unpublished opinion). This Court should not tolerate such obfuscation of a "bedrock" constitutional right. *Crawford*, 541 U.S. at 42.

C. There Is A Pressing Need For This Court To Delineate The Scope Of *Crawford*'s Testimonial Principle, Especially In This Context.

This Court should not wait any longer before beginning to delineate the scope of *Crawford*'s testimonial principle. On the day *Crawford* was announced, the Chief Justice (joined by Justice O'Connor) stated:

> [T]he thousands of federal prosecutors and tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

541 U.S. at 75-76 (Rehnquist, C.J., concurring in the judgment) (internal citation omitted).

Whether or not it would have been advisable in *Crawford* itself to expound further on the testimonial principle, the time unquestionably has come, over one year later, to commence that effort. "Courts across the country are churning out *Crawford*-related opinions at breakneck speed." Rene L. Valladares & Franny A. Forsman, Crawford v. Washington: *The Confrontation Clause Gets Teeth*, 12 Nev. Law. 12, 14 (Sept. 2004); *see also* Major Robert Wm. Best, *To Be Or Not To Be Testimonial?*, 2005 Army Lawyer 65, 87 (2005) ("Every week, at least twenty opinions are released that make a citation to *Crawford*."). The divergent views concerning how to analyze excited utterances describing criminal activity have been fully vetted and the conflicting rules are becoming increasingly entrenched. And the conflict has reached state high courts and federal appellate courts. *See supra* at 10-18. Further appellate percolation would consist of nothing more than choosing sides. *See, e.g., Greene*, 874 A.2d at 776 (recent Connecticut Supreme Court decision simply noting conflicting decision from Georgia

Supreme Court in a "*but see*" citation); *Ruth*, ___ S.W.3d at ___, 2005 WL 1431324, at *6 (treating conflicting authority same way).

The necessity of resolving the question presented here is particularly pressing because "a large number of jurisdictions" use the excited utterance exception, as the State of Washington did in this case, to conduct "victimless" (or "evidence based") prosecutions – that is, prosecutions that, instead of putting the alleged victim on the stand at trial, are "based largely on the admission of hearsay statements that a victim makes to 911 operators, police officers," and similar officials. Andrew King-Ries, Crawford v. Washington: *The End of Victimless Prosecution?*, 28 Seattle U. L. Rev. 301, 301, 309 (2005) (describing this practice in Washington and other states). Although prosecutions "rarely if ever" were conducted using absent victims' accusations before the advent of the *Roberts* framework, Friedman & McCormack, 150 U. Pa. L. Rev. at 1222-24, Washington and other states are maintaining they may do so even now that *Crawford* has abrogated *Roberts*. *See, e.g., Stancil*, 866 A.2d at 807 (describing prevalence of victimless prosecutions in District of Columbia in the course of addressing argument that they are still permissible); *People v. Moscat*, 777 N.Y.S.2d 875, 878 (N.Y. Crim. Ct. 2004) (same in New York City); Donna B. Bloom, Comment, *"Utter Excitement" About Nothing: Why Domestic Violence Evidence-Based Prosecutions Will Survive* Crawford v. Washington, 36 St. Mary's L.J. 717, 731 & n. 65, 751 (2005) (arguing that "*Crawford* has or should have no effect in Texas" with respect to basing evidence-based prosecutions on excited utterances). New cases are being filed and prosecuted in this mode every day – in domestic violence as well as in other types of cases. *See, e.g., State*

v. Williams, 2005 WL 120054, at ¶¶ 3-9 (Ohio App. 2005) (ordinary assault case); *Jimenez*, 2004 WL 1832719 (ordinary robbery case in California).

Consequently, several courts and commentators in this particular context have since echoed, and amplified, the Chief Justice's call for prompt guidance concerning the testimonial principle. *See, e.g., Hammon*, ___ N.E.2d at ___, 2005 WL 1406007, at *6 (judges "need answers" regarding *Crawford*'s reach); *Moscat*, 777 N.Y.S.2d at 877-78 (Chief Justice's concerns are, "[i]f anything, understated"); *Grace*, 111 P.3d at 37 (*Crawford*'s lack of a comprehensive definition of testimonial has left courts in a "quandary"); Won Sin, Comment, Crawford v. Washington: *Confrontation Clause Forbids Admission of Testimonial Out-of-Court Statements Without Prior Opportunity to Cross-Examine*, 40 Harv. C.R.-C.L. L. Rev. 223, 232 (2005) (Chief Justice's warning that the Court's decision would cast a mantle of uncertainty over future trials "is coming true before our very eyes" with respect to 911 calls); Mosteller, 39 Rich. L. Rev. at 608 (*Crawford* has created "great uncertainty" concerning victimless prosecutions); *The Supreme Court – Leading Cases*, 118 Harv. L. Rev. 248, 321 (2004) ("Equally as significant as the Court's holding, then, is what it failed to resolve," including the status of "911 phone calls"); Karan & Gersten, 13 Juvenile & Family Justice Today at 22 ("As Chief Justice Rehnquist noted in his concurring opinion in *Crawford*, the legal community needs answers to the hearsay problem now."); Best, 2005 Army Lawyer at 80 (testimonial principle "need[s] some simplification and clarification").

Delaying guidance regarding how *Crawford* applies to excited utterances describing criminal activity to governmental agents not only would prolong frustration in trial and appellate courts; it would impose serious costs on both prosecutors and

defendants. Prosecutors are maintaining in professional publications that they "must continue to argue that *Crawford* does not bar traditional evidence in evidence-based prosecutions." Adam M. Krischer, *"Though Justice May Be Blind, It Is Not Stupid": Applying Common Sense to* Crawford *In Domestic Violence Cases*, 38 Prosecutor 14, 16 (Nov./Dec. 2004) <http://www.ndaa-apri.org/publications/ndaa/toc_prosecutor.html>; *see also* Erin Leigh Claypoole, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases Without a Victim*, 39 Prosecutor 18, 21, 26 (Feb. 2005) (prosecutors must be "ready, willing, and able" to press ahead in evidence-based prosecutions and to argue against *Crawford* objections); Victor I. Veith, *Keeping the Balance True: Admitting Child Hearsay in the Wake of* Crawford v. Washington, 16 Update No. 12 (American Prosecutors Research Institute 2004) <http://www.ndaa-apri.org/publications/newsletters/update_volume_16_number_12_2004.html> ("*Crawford* specifically called into question the excited utterances made to a police officer in *White v. Illinois* that were in response to questioning. Keep in mind, though, that this language in *Crawford* is merely dicta. Prosecutors must be prepared to argue in future cases" that statements made in informal settings are not testimonial – "whether or not the statement [at issue] was made to an investigator."); King-Ries, 28 Seattle U. L. Rev. at 320-28 (former prosecutor arguing *Crawford* should allow the use of all accusations that satisfy modern excited utterance exception); Celeste E. Byrom, Note, *The Use of the Excited Utterance Hearsay Exception in the Prosecution of Domestic Violence Cases After* Crawford v. Washington, 24 Rev. Litig. 409, 428 (2005) ("[T]he prosecutor should argue that *Crawford*'s rule does not apply to excited utterances because (1) *Crawford* does not expressly overrule *White v. Illinois*, and (2) by definition, an excited utterance cannot be 'testimonial.'").

Accordingly, as soon as *Crawford* was announced, prosecutors began advising law enforcement agencies to "develop protocols for identifying and recording excited utterances" in "government-directed interview[s]." Murphy, 23 ABA Child Law Practice, *supra*, at 131; *see also* Wendy N. Davis, *Hearsay, Gone Tomorrow?*, 90 ABA Journal 22, 24 (Sept. 2004) (After *Crawford* was announced, prosecutors' offices "immediate[ly]" began "instructing officers to take notes of the victim's demeanor at the scene – such as 'she was screaming, she was crying' – to prove that the statement was an excited utterance and not the product of an interrogation."). One article in *Prosecutor* magazine emphasizes that "[o]ne of the most helpful pieces of evidence in an evidence-based prosecution is the 911 call of a scared, crying victim" and urges protocols including "training . . . the dispatchers who take 911 calls from domestic violence victims." Claypoole, 39 Prosecutor at 20.

Prosecutors also are developing their own protocols premised on a constricted reading of *Crawford*. A publication from the American Prosecutors Research Institute provides a detailed list of several "predicate questions" prosecutors should use to lay a foundation to "overcome a [*Crawford*] challenge to the introduction of excited utterances made by a victim to a police officer." Cindy Dyer, *Sample* Crawford *Predicate Questions*, 1 The Voice 8 (Nov. 2004) <http://www.ndaa-apri.org/pdf/the_voice_vol_1_issue_1.pdf>. Typical questions are: "Describe the victim's emotional condition at the time you were talking to her."; "Were your questions to her an interrogation or merely part of your initial investigation?"; "Were those questions asked in order to determine whether a crime had even occurred?"; and "At this time, did the victim make any statements to you that were not in response to any questions?" *Id.* at 8-

9; *see also* Byrom, 24 Rev. Litig. at 424-26 & n.86 ("[I]t is extremely important for a prosecutor to distinguish informal police questioning from the more formal questioning of police interrogation"). Some courts already have rested decisions upon such spoon-fed testimony. *See, e.g., Hembertt*, 696 N.E.2d at 479 (noting that officer "agreed" with prosecutor's suggestion that the victim's statement to him "was not in response to a question that [he] or another officer asked"); *Marc*, ___ S.W.3d at ___, 2005 WL 1294969, at *10 ("The officers' testimony indicates that each one asked questions of a lone, visibly upset female . . . in an attempt to determine the reason for her emotional state."); *cf. Hammon*, ___ N.E.2d at ___, 2005 WL1406007, at *11 (affidavit victim filled out at the scene testimonial but oral statements made to officer minutes before nontestimonial because the officer at that time "was essentially attempting to determine whether anything requiring police action had occurred").

It comes as no surprise that criminal defense lawyers are urging precisely the opposite approach. Public defenders are asserting that *Crawford* "shut down" prosecutors' ability to bring evidence-based prosecutions based on 911 calls or statements to responding officers. David Feige, *Domestic Silence: The Supreme Court Kills Evidence-Based Prosecution*, Slate, Mar. 12, 2004 <http://slate.msn.com/id/2097041>; *see also* Valladares & Forsman, 12 Nev. Law. at 14 ("witness statements to investigating officers are typically testimonial as they are generally given for evidentiary purposes"). Several law professors have echoed this assessment: "If [under *Crawford*] we are to imagine the Framers' reaction to practices that did not exist at the time, we could imagine few practices that would have been more abhorrent to their values than [victimless prosecutions]." Mosteller, 39 U. Rich. L. Rev. at 607-08 & n.548; *see also*

Lininger, 91 Va. L. Rev. at 776, 781 (under *Crawford*, "911 calls appear to be a precarious basis for 'evidence-based' prosecutions," and "prosecutors will take a tremendous risk if they continue to stake 'evidence-based' prosecutions on hearsay statements to responding officers"); Andrew Siegal, *Court Is Adjourned – What Have We Learned?*, 16 S. Carolina Lawyer 14, 20 (2004) (evidence-based prosecutions "almost certainly" unconstitutional under *Crawford*); Edward J. Imwinkelried, *The Treatment of Prosecution Hearsay Under* Crawford v. Washington: *Some Good News But* . . . , 28 The Champion 16, 18 (Sept./Oct. 2004) ("prosecutors will be unable to generalize all . . . 'excited utterances' . . . as automatically nontestimonial"); Best, 2005 Army Lawyer at 86 ("Whether there is a constitutional difference between a preliminary investigation and a later investigation is a dubious distinction at best.").

Until this Court resolves this issue, the only thing prosecutors and defenders will agree upon in the hundreds or thousands of cases across the country raising it is that the issue is critically important. *See* Leonard Post, *Prosecutors Feel Broad Wake of 'Crawford,'* 27 Nat'l L.J. No. 15, Dec. 13, 2004, at 1 (discussing uncertainty regarding inadmissibility of 911 calls); Allie Phillips, *Weathering the Storm After* Crawford v. Washington, 17 Update No. 6 (American Prosecutors Research Institute Nov. 6, 2004) ("Since *Crawford*, the firmly rooted hearsay exception of excited utterance has been the most discussed and controversial of all hearsay exceptions."); Dennis J. Opatmy, Crawford *Ruling Affirms Confrontation Clause*, L.A. Daily J., Apr. 14, 2004, at 1 (prosecutors and defense lawyers "agreed that one of the key issues is whether spontaneous statements, or 'excited utterances,'" made to governmental officials are testimonial); Neil P. Cohen & Donald F. Paine, Crawford v. Washington: *Confrontation*

Revolution, 40 Tenn. Bar J. 22 (May 2004) (lamenting the "disturbing uncertainties" over whether excited utterances reporting recent criminal activity are testimonial); John Council, *The* Crawford *Questions*, Law.com, July 2, 2004 <http://www.law.com/jsp/article.jsp?id=1088138437273> (describing disputes between prosecutors and defense lawyers in pending cases involving "excited utterances victims make to police officers" and to 911 operators); Byrom, 16 Rev. Litig. at 419 ("Until a more precise definition is pronounced, prosecutors will be left scratching their heads over whether a victim's statement is testimonial and, therefore, subject to *Crawford*'s requirements.").

All the while, the uncertainty concerning *Crawford*'s reach is increasingly threatening core constitutional values. Perhaps most pointedly, the question whether excited utterances alleging criminal conduct are testimonial controls not merely whether prosecutors may use such statements when declarants become unavailable for trial; it determines whether prosecutors even have an obligation to try to produce such accusers at trial in the first place. This Court held in *White v. Illinois* that states may introduce out-of-court "excited utterances" against criminal defendants regardless of whether the declarant has been shown to be unavailable for trial. 502 U.S. at 355-58; *see also, e.g.*, Fed. R. Evid. 803(2) (unavailability not required under excited utterance exception); Wash. R. Evid. 803(a)(2) (same). Taking the subsequent holding in *Crawford* into account, this means that if excited utterances to governmental agents are not testimonial, states may use them to convict a defendant regardless of whether they even try to secure the accusers' live testimony. Police and prosecutors will lack any incentive to do what the Confrontation Clause, not to mention due process in general, urges: finding witnesses and calling them at trial, so juries can observe them in an adversarial setting.

Furthermore, the finality of innumerable criminal convictions depends on resolving the question presented. A cloud of potential constitutional error hangs over every new guilty verdict obtained under the assumption that *Crawford* allows victims' excited utterances alleging criminal conduct to be used in the place of live testimony subject to cross-examination. The sooner this Court decides this issue, the fewer cases may need to be retried. And the sooner this Court clarifies *Crawford*'s scope in the context of governmental interviews conducted shortly after crimes have occurred, the sooner prosecutors and trial judges can adjust their practices to ensure in future trials that defendants are not deprived of a fundamental constitutional guarantee.

D. This Case Is An Excellent Vehicle For Clarifying The Scope Of The Testimonial Principle.

For three reasons, this case is an excellent vehicle for this Court to resolve the conflict over *Crawford*'s application to statements reporting recent criminal activity to governmental agents, as well as to begin the more general enterprise of clarifying the boundaries of the testimonial principle.

1. There are no procedural impediments to reaching the question presented. The case is on direct review, and Petitioner has contested the admissibility of McCottry's responses to the 911 operator's questions at every stage of the proceedings. The Washington Supreme Court applied *Crawford* to the facts of the case without noting any procedural problems, giving this Court a clean appellate opinion to review.

2. As is ordinarily the case in "victimless prosecutions," Davis' conviction stands or falls on the applicability of *Crawford*. The prosecutor told the trial judge that this is "a typical case involving domestic violence" because "the evidence . . . is very minimal, and it comes down to credibility issues between one of three people or potentially two

people[,] meaning the complaining victim and the defendant." Report of Proceedings (Sept. 4, 2001) at 44. Yet the State was never required to make any effort to produce the victim to take the stand. Davis was never able to ask a single question of his accuser. This case thus places the consequences of condoning victimless prosecutions for confrontation law – and for the adversarial process in general – in stark relief.

The dissent, in fact, expressly found that "[g]iven that there was no evidence introduced at trial other than the 911 tape which showed that Davis assaulted McCottry or violated the no-contact order, the admission of the 911 tape was not harmless." App. 11 (Sanders, J., dissenting). The majority never suggested otherwise.

3. More generally, the excited utterance issue here is an excellent one to begin elaborating the meaning of "testimonial" because the issue arguably cuts across the *Crawford* opinion's three potential formulations of the term. *See, e.g.*, Best, 2005 Army Lawyer at 79 ("The[] 911 phone call cases point to the difficulty courts are having in the absence of a comprehensive definition of testimonial."). One of those formulations requires statements to be made in a "formalized" setting to be testimonial, while the other two do not. *See Crawford*, 541 U.S. at 51-52; *Greene*, ___ A.2d at ___, 2005 WL 1384052, at *16 & n.16 (elaborating on this difference). Not surprisingly, therefore, some courts have held that a statement must be "formal" to be testimonial, while some have held it need not be. *Compare Cage*, 15 Cal. Rptr. 3d at 856 ("a hearsay statement is not testimonial unless it is made in a relatively formal proceeding that contemplates a future trial"); *Mungo*, 393 F.3d at 336 n.9 (requiring "formality, command, and thoroughness") (quotation omitted); *with Cromer*, 389 F.3d at 674 (rejecting argument that testimonial principle applies "only in the instance of formalized statements"); *and*

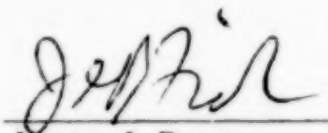
Kilday, 20 Cal. Rptr. at 173 ("an interpretation of *Crawford* that makes the presence or absence of indicia of formality determinative is inconsistent with [the decision]").

What is more, even courts and commentators within the group requiring formality disagree over exactly what constitutes formality. Some limit the concept to stationhouse interrogations while others extend it to 911 calls and field interviews with responding officers. *Compare King*, ___ P.3d at ___, 2005 WL 170727, at *6; (statement to responding officer in field interview lacks "indicia of formality"); *People v. Lugo*, 2004 WL 2092018, at *8 (Cal. App. 2004) (unpublished opinion) (a police invitation at the scene for alleged victim to tell story involves "no formality at all"); *Corella*, 18 Cal. Rptr. 3d at 776 (statements in 911 call "bear no indicia common to the official and formal quality of the various statements deemed testimonial in *Crawford*"); *with Stancil*, 866 A.2d at 810, 813 (*Crawford* requires "some level of structure or formality" but field interviews immediately after incident satisfy that test); *Lopez*, 888 So.2d at 700 (statement to a responding officer constitutes "a formal report of the incident"); *Cortes*, 781 N.Y.S.2d at 406 ("The procedures in connection with 911 calls meet the definition of formal."). Resolving the conflict here would sort out whether some degree of "formality" is necessary to trigger *Crawford*, and, if so, what that concept means. The lower courts cannot settle this issue themselves.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 8th day of July, 2005.



JEFFREY L. FISHER
Counsel of Record
LISSA WOLFENDALE SHOOK
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150

NANCY COLLINS
WASHINGTON APPELLATE PROJECT
1511 Third Avenue
Suite 701
Seattle, WA 98101
(206) 587-2711